Supreme Court, U
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No. 90-15

In the Supreme Court of the United States

OCTOBER TERM, 1990

IAN GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Colorado v. *Connelly*, 479 U.S. 157 (1986)	5
Connecticut v. *Barrett*, 479 U.S. 523 (1987)	5
Fare v. *Michael C.*, 442 U.S. 707 (1979)	6
Miranda v. *Arizona*, 384 U.S. 436 (1966)	3, 4
North Carolina v. *Butler*, 441 U.S. 369 (1979)	5
Smith v. *Illinois*, 469 U.S. 91 (1984)	5
Tague v. *Louisiana*, 444 U.S. 469 (1980)	5

Constitution and statute:

U.S. Const. Amend. V	3
21 U.S.C. 841 (a) (1)	2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is reported at 895 F.2d 932.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1990. A petition for rehearing was denied on March 31, 1990. Pet. App. A42-A44. The petition for a writ of certiorari was filed on June 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1). He was sentenced to 27 months' imprisonment. The court of appeals affirmed petitioner's conviction but held that he was not entitled to a downward adjustment of his offense level under the Sentencing Guidelines based on his role in the offense. On remand, the district court resentenced petitioner to 33 months' imprisonment.

1. On September 14, 1988, a Drug Enforcement Administration (DEA) agent and a sheriff's deputy were conducting surveillance of passengers at Washington National Airport. The officers observed petitioner arriving at the airport on a flight from New York. They followed petitioner outside the terminal, where the DEA agent approached petitioner and identified himself as a member of a drug interdiction team. At the agent's request, petitioner agreed to allow the officer to search his bag. After inspecting the bag and finding no contraband, the agent asked permission to perform a pat-down search, and petitioner again agreed. Upon discovering a bulge in petitioner's pocket, the agent asked to see its contents. Petitioner removed a plastic bag containing 249.5 grams of cocaine. Pet. App. A3-A5; Gov't C.A. Br. 3-4.

The officers placed petitioner under arrest and advised him of his *Miranda* rights. Petitioner acknowledged that he understood those rights. The deputy asked petitioner if he would answer some questions, to which petitioner replied, "What do you want to know?" Pet. App. A5. The deputy then asked, "Where were you taking this stuff?" In response,

petitioner "just looked and shook his head." C.A. App. 58. After transporting petitioner to a nearby police station, the deputy resumed the questioning. When the officer asked petitioner if he used cocaine, petitioner shook his head in a negative manner. Petitioner made no other statements in response to questioning. Pet. App. A5; Gov't C.A. Br. 4-5.

Petitioner moved to suppress his negative response to the question whether he used cocaine, claiming that its admission would violate his Fifth Amendment rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).[1] Pet. App. A6. After conducting an evidentiary hearing at which it heard testimony from petitioner and both officers, the district court denied the motion, concluding that petitioner had validly waived his *Miranda* rights. C.A. App. 104-105.

2. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A26. On appeal, petitioner argued that he had invoked his right to terminate the interrogation by shaking his head in response to the question about where he was taking the cocaine. The court rejected petitioner's argument, concluding that the reasonable interpretation of petitioner's head shake was that "he did not know or that he did not intend to answer that question—not that he was refusing to answer other questions." Pet. App. A25. The court noted that petitioner "indicated that he understood his rights, did not request counsel, and when asked whether he would answer some questions, responded by asking 'what do you want to know.' " Pet. App. A25-A26. The court therefore upheld the

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[1] Petitioner's response to the question was relevant because it could be taken as suggesting that the cocaine found on petitioner's person was intended for distribution rather than personal use. Pet. App. A23, A29.

district court's finding that petitioner had waived his *Miranda* rights.

Judge Murnaghan dissented. Pet. App. A27-A41. Characterizing petitioner's head gesture as "an ambiguous refusal to answer a question," Judge Murnaghan concluded that "[t]he police should have clarified [petitioner's] refusal to answer the question in order to determine whether he was willing to talk." Pet. App. A34-A35. Because he found "insufficient evidence to conclude that [petitioner] knowingly and voluntarily waived his *Miranda* rights," Judge Murnaghan would have reversed petitioner's conviction. Pet. App. A32, A39.

ARGUMENT

Petitioner renews his contention (Pet. 8-23) that his response to the officer's question about where he was taking the cocaine could be understood as an invocation of his rights under *Miranda* v. *Arizona*, *supra*, and that the subsequent questioning therefore violated his *Miranda* rights. That fact-bound contention is without merit.

Petitioner first contends (Pet. 8-16) that review of this case is necessary to decide what action police are required to take in response to a suspect's equivocal assertion of his *Miranda* rights. On the facts as found by the courts below, however, this case does not present that question. The district court found, and the court of appeals agreed, that petitioner waived his *Miranda* rights when he indicated that he understood those rights and asked the officers, "What do you want to know?" Although petitioner later shook his head in response to a specific question, neither the court of appeals nor the district court found that petitioner's gesture could reasonably be interpreted as an invo-

cation of his *Miranda* rights. On the contrary, the district court determined, after hearing testimony from the arresting officers and from petitioner, that petitioner's head shake in response to a single question was not intended to invoke his right to terminate all questioning. The court of appeals upheld that determination. See Pet. App. A25 ("We agree with the district court that [petitioner] did not indicate that he intended to conclude all questioning."). The lower courts' interpretation of petitioner's response to the officer's question presents no issue calling for this Court's review.[2]

Petitioner also contends (Pet. 16-20) that by considering whether petitioner had invoked his right to remain silent, the court of appeals improperly shifted the burden of proving a waiver of *Miranda* rights from the government to the defendant. Petitioner is simply incorrect. It is clear that the government bears the burden of establishing that a defendant knowingly and voluntarily waived his *Miranda* rights. See *Colorado* v. *Connelly*, 479 U.S. 157, 167-169 (1986); *Tague* v. *Louisiana*, 444 U.S. 469, 470-471 (1980) (per curiam); *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979). The determination whether the government has met its burden "is to be made upon an inquiry into the totality of the cir-

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[2] Petitioner suggests (Pet. 16) that review of this case is needed to resolve an issue left open in *Smith* v. *Illinois*, 469 U.S. 91 (1984) (per curiam), in which the Court found it unnecessary to decide the proper course for police officers to follow when a suspect responds to *Miranda* warnings with an ambiguous or equivocal request for counsel. *Id.* at 95-96 & n.3; see also *Connecticut* v. *Barrett*, 479 U.S. 523, 529 n.3 (1987). Because both courts below concluded that petitioner made no request for counsel, ambiguous or otherwise, that issue is not presented here.

cumstances surrounding the interrogation." *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979). Here, the court of appeals properly considered "[a]ll of the circumstances," Pet. App. A26—including the fact that petitioner had indicated his willingness to answer questions by asking the officers what they wanted to know—and reasonably concluded that petitioner waived his *Miranda* rights. There is no indication that the court shifted the burden of proof to petitioner, and no reason for this Court to disturb the lower courts' evaluation of the facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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